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Drawings:

Please cancel the request to amend drawing sheet 14/19, Figure 27, with item 100, as Figure 27E is needed to show support 62 having been made with only two ingredient materials.

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Remarks General**Specification:**

Applicant has remedied the amendments to the specification as needed.

Claims:

Please enter the above claims amendment in place of the un-entered amendment of January 16, 2009. Factual evidence for claims 385, 396, 405, "...wherein said two ingredient materials comprise said edible composite material." "wherein said edible material consists of said two ingredient or constituent materials" may be found in figure 13A item 100; paragraphs [0217] [0397] hollow licorice with filling (claim 350); [0166] example of Three Musketeers Bar i.e. made up of two ingredient materials; of the specification. One skilled in the art is well aware that the materials that make up well known composite candy bars are constituent materials. See "evidence," below.

No new matter has been introduced. The term "constituent" is an alternative expression and is allowed and has already been examined in previous office actions by Examiner for Applicant's invention. What is already in front of one is not new. Under the fundamental principal of 35 U.S.C. 112, second paragraph, Applicant can use alternative expressions... to define the subject matter of Applicant's claims. **MPEP 2173.01; *In re Swinehart***

2173.01 Claim Terminology

A fundamental principle contained in 35 U.S.C. 112, second paragraph is that applicants are their own lexicographers. They can define in the claims what they regard as their invention essentially in whatever terms they choose so long as **>any special meaning assigned to a term is clearly set forth in the specification. See MPEP § 2111.01.< Applicant may use functional language, alternative expressions, negative limitations, or any style of expression or format of claim which makes clear the boundaries of the subject matter for which protection is sought. As noted by the court in *In re Swinehart*, 439 F.2d 210, 160 USPQ 226 (CCPA 1971), *a claim may not be rejected solely because of the type of language used to define the subject matter for which patent*

protection is sought.

When a disclosure describes a claimed invention in a manner *that permits one skilled in the art to reasonably conclude that the inventor possessed the claimed invention* the written description requirement is satisfied. (MPEP '2163 (emphasis added)). "Reasonable clarity" (MPEP '2163.02).

II. "OR" TERMINOLOGY

Alternative expressions using "or" are acceptable, such as "wherein R is A, B, C, or D." The following phrases were each held to be acceptable and not in violation of 35 U.S.C. 112, second paragraph in *In re Gaubert*, 524 F.2d 1222, 187 USPQ 664 (CCPA 1975): "made entirely or in part of"; "at least one piece"; and "iron, steel or any other magnetic material."

MPEP 2173.02 Clarity and Precision [R-3]

Accordingly, a claim term that is not used or defined in the specification is not indefinite if the meaning of the claim term is discernible. *Bancorp Services, L.L.C. v. Hartford Life Ins. Co.*, 359 F.3d 1367, 1372, 69 USPQ2d 1996, 1999-2000 (Fed. Cir. 2004) (holding that the disputed claim term "surrender value protected investment credits" which was not defined or used in the specification was discernible and hence not indefinite because "the components of the term have well recognized meanings, which allow the reader to infer the meaning of the entire phrase with reasonable confidence").<

If the language of the claim is such that a person of ordinary skill in the art could not interpret the metes and bounds of the claim so as to understand how to avoid infringement, a rejection of the claim under 35 U.S.C. 112, second paragraph, would be appropriate. See *Morton Int'l, Inc. v. Cardinal Chem. Co.*, 5 F.3d 1464, 1470, 28 USPQ2d 1190, 1195 (Fed. Cir. 1993). However, if the language used by applicant satisfies the statutory requirements of 35 U.S.C. 112, second paragraph, but the examiner merely wants the applicant to improve the clarity or precision of the language used, the claim must not be rejected under 35 U.S.C. 112, second paragraph, rather, the examiner should suggest improved language to the applicant.

TWO CONSTITUENT MATERIALS - EVIDENCE

The terminology, "comprising an edible confectionary material comprising two ingredient materials within said edible confectionary material, [or two constituent ingredient materials, (alternative expression)] " may at least be found in paragraphs:

Figure 27E;

Also see: Figure 13A item 100; paragraphs [0217] [0397] hollow licorice with filling (claim 350);

[0173] The different ingredients within stick 62A may be arranged concentrically as in FIG. 31, with a cylindrical cookie on the inside covered by caramel (or other method), which is then dipped in a chocolate, yogurt, etc., moisture-proof barrier 86. More than one kind of barrier 86 may be layered to add more flavor. The ingredients within support 62A may also be reversed, layered, horizontally or vertically, swirled or twisted together and covered with barrier 86 and mess guard 76. This embodiment also has mess guard 76 for the fingers.

[0184] "Ingredients can run in any direction (or a combination of directions), such as diagonally within composite stick 62 to inhibit the horizontal breaking of composite support 62." "Different ingredients running concentrically, parallel or maneuvered within the stick, such as twisted within support 62 (or other supports) make the stick stronger and less prone to breakage."

[0253] Support 62A can be a combination of two or more sticks, from top to bottom, that can be twisted or attached together for a variety of flavors and appearances, such as the candy sold under the trademark *The Wizard of Oz Kansas Twisters* by Hollywood Partners, Inc. of Los Angeles, Calif.

[0167] One such candy bar has the ingredients of a whipped chocolate nougat center that is then coated with a thick chocolate coating (barrier 86), sold under the trademark *Three Musketeers* by Mars, Incorporated of Hackettstown, N.J. (Two ingredient materials)

[0309] A circular candy sold under the Trademark *York Peppermint Pattie* by Hershey Foods Corporation of Hershey, Pa. is also adaptable to support confection 84. (i.e. two ingredient materials)

[0331] Cookie bars such as the one sold under the trademark Twix by Mars Incorporated of Hackettstown, N.J., can be made more durable by adding another layer of caramel, or other strong ingredient, to the bottom of the long cookie within the cookie bar, as well as the layer of caramel that is supplied to the top.

[0380] Several kinds of edible supports can be maneuvered, affixed or twisted or placed together to make a single support, such as licorice and marshmallow. (i.e. two ingredient materials)

[0397] A malleable support that has a hollow center, can be filled with another confection. A more fluid or jell-type confection may be placed inside the hollow center or another edible support or comestible for a burst of flavor. A smaller rope of licorice, such as shoelace licorice, may be placed in this hollow elongated center. Tiny candy beads, or flavored and colored sugar, etc., may also be placed in the long, hollow center of a malleable support. (i.e. two ingredient materials)

Composite Ingredients:

[0013] Falcone's support stick does not bend and is not malleable. His support *stick* does not contain layers of different ingredients or composite ingredients, to provide a durable support with

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maximum flavor and taste, or provide a long lasting second dessert with an already familiar taste for the consumer.

[0184] Support 64 is shown with composite ingredients as in support 62, but it can also be made as support 60, 70.

One skilled in the art is well aware that the materials that make up well known composite candy bars are constituent materials. No new matter has been introduced. The term “constituent” has already been examined in previous office actions by examiner for Applicant’s invention. What is already in front of one is not new and does not need further examination. Under the fundamental principal of 35 U.S.C. 112, second paragraph, and according to **MPEP 2173.01**, Applicant is permitted to use alternative language... to define the subject matter of Applicant’s claims.; *In re Swinehart* “Reasonable clarity” (**MPEP ’ 2163.02**). “the components of the term have well recognized meanings...” 2173.02 Clarity and Precision [R-3]

Applicant’s term “constituent” has well recognized meaning and satisfies the statutory requirements of 35 U.S.C. 112, second paragraph, and is therefore permitted.

(However, if the language used by applicant satisfies the statutory requirements of 35 U.S.C. 112, second paragraph, but the examiner merely wants the applicant to improve the clarity or precision of the language used, *the claim must not be rejected under 35 U.S.C. 112, second paragraph*, rather, the examiner should suggest improved language to the applicant.)

Regarding Election/Restriction

No restriction had been made regarding method claims for the above application. Please see correspondence of January 16, 2009 which is documented as being on file.

Claim rejections 35 USC Section 112 first and second paragraphs

Please see correspondence of January 16, 2009 which is documented as being on file, and as such

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would have no need of sending this information twice. All of applicant's claim terms are well known terms to those skilled in the art.

**Applicant's Claims Recite Novel Structure and So Distinguish
Over Musher and Feybusch Under 35 USC section 102**

N. B. Please refer to the Remarks of January 16, 2009 for the full argument regarding the above amendment.

N.B. Finality of the Next Action Is Precluded

Although the Summary of the past Office Actions indicates that claims 349 - 382 stand rejected, the Detailed Actions omit any explanation of how any cited art anticipates these claims. Applicant respectfully submits that this omission amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to the Applicant. Consequently, a next Office Action rejecting claims 383 - 417 cannot properly be made final since only then would the Applicant be obligated to rebut the rejection, presuming that such an Office action sets forth a prima facie case. (See MPEP ' 706.07(a)).

Constituent: 1. serving to compose or make up a thing; component: the constituent parts of a motor. (Dictionary.com)

All of the claims clearly recite novel features over Musher and Feybusch under Section 102.

Independent claim **383** first recites: "A non-frozen support for a frozen comestible..."

This limitation clearly distinguishes over Musher whose support does not show a non-frozen support. All of Musher's embodiments *as made and completed* in the drawings, specification, and claims all show a frozen support.

Claim **383** then recites: "... comprising an edible confectionary material comprising two ingredient materials within said edible confectionary material or two constituent ingredient materials."

This limitation clearly distinguishes over Musher as Musher does not show a non-frozen material comprising two ingredient materials, or two non-frozen constituent materials.

Musher also does not show two ingredient materials that can serve to compose or make up his framework.

This limitation clearly distinguishes over Feybusch who shows only the single ingredient materials of usual pastry cone, molasses, hard crack peanut brittle, corn, and nut. He does of show two ingredient materials in any one of his materials.

Independent claim 394 first recites: "A support for a frozen comestible comprising an edible composite material, said edible composite material comprises two ingredient materials within said edible composite material or two constituent ingredient materials."

This limitation clearly distinguishes over Musher as Musher does not show a composite material. Musher's support stick comprises only one ingredient material, baked stick. His lollipop is also one ingredient material. His framework is largely voids or interstices in all his embodiments that are required to support his ice cream. His framework therefore has never been, or show a solid material or a composite material.

This limitation also clearly distinguishes over Feybusch as each of his materials comprise only one ingredient material of usual pastry cone, molasses, hard crack peanut brittle, corn, and nut, and therefore does not comprise a composite material. His cone also requires many interstices, or cracks in which to hold melted ice cream in all of his embodiments, having never been a solid material, and therefore and does not show a composite material.

Independent 405 recites: "A method of making a support for a frozen comestible comprising comprising an edible material comprising two ingredient materials within said edible material or two constituent ingredient materials in a support for a frozen comestible, wherein said two constituent materials comprise said edible material."

This limitation clearly distinguishes over Musher whose framework requires a great many

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materials and cannot be made and completed with only two ingredient materials.

This limitation also clearly distinguishes over Feybusch whose materials each comprise only one ingredient material.

Independent claims **403** and **412** recite similar limitations. Claim 403 is a means claim and claim 412 is a method claim of making the support.

Therefore applicant submits that applicant's support is both novel and unobvious over Musher and Feybusch and submits that the independent claims and hence all claims should be allowed.

The dependent claims recite additional features of the invention to the independent claims and therefore applicant respectfully submits that they are a fortiori allowable.

In addition to the reason above, for at least the following reasons the finality of the next office action is precluded: Anticipation is based on FACT. Examiner has yet to identify to Applicant as to why Examiner holds to the rejection of Applicant's claims as to Musher's support being non-frozen, when all embodiments show a frozen support. Examiner has also yet to identify to Applicant *which one* of Musher's materials comprises two ingredient materials, and what the two ingredient materials specifically are. Examiner has thus not identified any of Musher's materials properly in any previous office action as required, MPEP § 707.07(f), and therefore cannot make the following office action final. Examiner is also not permitted to continue to downplay Applicant's remarks with moot or dismissive arguments, but must consider all of Applicant's correspondence and answer the substance of them. Applicant's comments are not made moot by way of amendments to the claims, and may not be thereby readily dismissed.

4. **Section 707.07(f)** of the Manual of Patent Examining Procedure (MPEP) instructs that: Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it. The Office

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repeated the rejections of all of the claims. The Office, however, neither "took note" of Applicants' argument nor "answered the substance" of Applicants' argument. Thus, the final Office Action is deficient because the Office failed to satisfy the requirements of MPEP § 707.07(f).

2131 Anticipation - Application of 35 U.S.C. 102(a), (b), and (e) [R-1]

TO ANTICIPATE A CLAIM, THE REFERENCE MUST TEACH EVERY ELEMENT OF THE CLAIM

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

The patent of Musher is at least silent as to a non-frozen support, a non-frozen material, two non-frozen ingredient materials, a composite material, and a non-frozen material comprising two constituent materials. Musher also does not show that his framework may be made up of only two ingredient materials. Feybusch does not show any material that comprises two ingredient materials within the material, since each of his materials comprise only one ingredient material. Neither Musher or Feybusch show a support for a frozen comestible that comprise an edible composite material. Applicant's support may be a cone for the subsequent placement of a frozen comestible, of a user's choice, and is patentably distinct. Musher does not show this. The liquid of Musher's ice cream would not congeal if not frozen and would pour out of the interstices onto the table. His invention is frozen. His support is frozen. Thus every element as set forth in the claim has NOT been found, see above. For at least the reasons stated above, the patents of Musher and Feybusch have not anticipated Applicant's claims. All elements of Applicant's invention are not anticipated. Therefore, the next office action cannot be legally be made final.

N. B. Please refer to the Remarks of January 16, 2009 for the full argument regarding the above amendment.

Conclusion

For all of the above reasons, Applicant submits that the claims define novel structure under §102, which novel structure is unobvious and thus patentable under §103. Accordingly Applicant

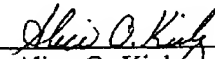
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respectfully requests reconsideration and allowance of the claims.

Conditional Request For Constructive Assistance

Applicant submits that she has a novel and unobvious invention. She has made a diligent effort to amend the claims of this application so that they recite novel features of her invention, which she submits are unobvious. If, for any reason, the Examiner believes that the claims of this application are not yet in full condition for allowance, Applicant respectfully requests the Examiner's constructive assistance and suggestions pursuant to the spirit of MPEP §706.03(d) and §707.07(j). This will enable the undersigned to place this application in fully allowable condition as soon as possible and without the need for further proceedings.

Very Respectfully,

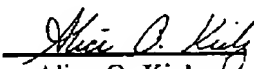

Alice O. Kiely

71 Stonewall Court
Yorktown Heights, NY 10598
Tel. (914) 245-6661

Attached:
Form 2038 / Fee
Request for extension of time for two months

Certificate of Facsimile: I certify that on the date below, this document and referenced attachments, if any, will be faxed to the central fax number of 571-273-8300 to the United States Patent and Trademark Office "Commissioner for Patents" Arlington, Virginia 22313.

2009 March 16,


Alice O. Kiely